No. 18396

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LONGINO CASTRO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES

RULES

STATUTES

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

Appellant Longino Castro was indicted on September 30, 1959, for violation of Title 21, United States Code, Section 174. The Judgment of Conviction was entered on November 25, 1959. The jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231.

Appellant's notice of appeal was filed on December 2, 1959.

The jurisdiction of this Court is predicated on Sections 1291 and 1294 of Title 28, United States Code.

II.
STATEMENT OF THE CASE.

An Indictment in two counts was filed on September 30, 1959, charging the appellant essentially as follows [C. T. 2-4]:[1]

Count One: Beginning on or about July 15, 1959, and continuing to August 28, 1959, defendants Nuel Arnold Melton and Longino Castro, did agree, confederate and conspire together to fraudulently and knowingly import and bring into the United States, heroin, a narcotic drug.

Count Two: On or about July 18, 1959, the defendants, Nuel Arnold Melton and Longino Castro, did knowingly import and bring into the United States of America, from Mexico, forty-five ounces of heroin, a narcotic drug.

On October 6, 1959, the appellant Longino Castro was arraigned and entered a plea of not guilty [C. T. 8].

The defendant, Nuel Arnold Melton, having been admitted to bail in the amount of $10,000, jumped bail [R. T. 202].[2] Thereafter, the District Court entered an order severing the trial of the appellant Longino Castro from the trial of the defendant Nuel Arnold Melton [R. T. 15-16].

A Motion for discovery and inspection was filed by appellant on October 8, 1959. On October 12, 1959, the court granted appellant's motion for discovery and inspection as to items 1 and 2 and denied as to item 3 [C. T. 5-9].

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[1]C. T. refers to Clerk's Transcript of Record.

[2]R. T. refers to Reporter's Transcript of Record.

The case was tried by the Honorable James M. Carter without a jury. Appellant was found guilty on both counts of the Indictment.

The Judgment was entered on November 25, 1959.

On November 24, 1959, the Government filed an Information *re* Prior Conviction pursuant to Section 7237 of Title 26, United States Code [C. T. 15].

On November 25, 1959, the appellant was sentenced to a period of thirty years on each count to run concurrently [C. T. 17].

On December 2, 1959, the appellant filed a notice of appeal from the judgment of conviction [C. T. 32].

On December 2, 1959, the District Court ordered that the appellant be permitted to prosecute his appeal *in forma pauperis* [C. T. 19].

On December 31, 1959, the appellant's motion to reduce sentence was granted and the sentence previously imposed was reduced to ten years on each count to run concurrently [C. T. 24].

A motion for new trial was filed by the appellant on June 23, 1961. The Government filed an opposition to appellant's motion for new trial on July 5, 1961. On September 25, 1961, the District Court denied the appellant's motion for new trial [C. T. 25-31]. Appellant did not take an appeal from the order denying the motion for new trial.

Three years after filing a notice of appeal, the appellant perfected his record on appeal [C. T. 33].

III.
STATUTE INVOLVED.

The Indictment charges a violation of Section 174 of Title 21, United States Code, which provides in pertinent part:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . contrary to law, or received, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts . . .
>
> "For a second or subsequent offense . . . the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000."

IV.
STATEMENT OF FACTS.

Charles Trumble, a Customs Inspector at the port of entry, San Ysidro, California, testified that during the evening of July 18, 1959, at the San Ysidro port of entry, that he observed an old gray Studebaker Sedan, California license number LBY 441, crossing from Mexico into the United States [R. T. 44]. Nuel Melton was driving the car and Mrs. Melton was a passenger [R. T. 56]. During a search of the Studebaker at the secondary inspection point Trumble discovered in the left side panel of the rear seat area a removable compartment. The compartment had been

screwed to the floorboard. When the compartment was removed the inspector discovered two pounds, ten ounces and 115 grains of heroin between the compartment and the outside metal of the car [R. T. 49-50]. The approximate United States market value of the heroin was in excess of $350,000 [R. T. 210].

Theodore Snyder, a Customs Inspector, testified that on July 18, 1959, at the San Ysidro port of entry, he discovered a registration slip signed "A. Welton" in the Studebaker [R. T. 57].

Agent King testified that following the discovery of the heroin at about 3:00 a.m. on July 19, 1959, he and several agents went to the Melton residence in Costa Mesa. Agent King entered the residence and observed the appellant Longino Castro talking on the telephone, with his back to the agents. Agent King overheard the appellant state to the party on the other end of the telephone, "here they come now"; then the appellant turned around with the receiver still in his hand, saw the agents, and without another word hung up the phone [R. T. 97]. Agent King discovered in the appellant's wallet the pink slip (California Ownership Document) to the Studebaker. The pink slip had been endorsed in blank "A. Welton" [R. T. 98, 203]. Agent King testified that the appellant stated he had flown down from San Francisco and taken a taxi to the Melton home in Costa Mesa on July 18, 1959 [R. T. 99-100]. The appellant further stated that he was babysitting for the Melton's while they went to the market [R. T. 100].

Agent Kingsbury testified that at 3:00 a.m. on July 19, 1959, he accompanied Agent King to the Mel-

ton residence; that on July 19, 1959, the appellant stated that July 18 was the first and only time he had ever been to the Melton home in Costa Mesa [R. T. 93]. When asked about the gray Studebaker Sedan, the appellant stated that on the night of July 18, 1959, he had gotten the car from an unidentified person, named Joe, in a bar. The appellant thought he would buy the car. When asked where the Studebaker was, the appellant stated that he had loaned the car to a man whose name he didn't know [R. T. 100]. When the appellant was again interviewed on August 28, 1959, the appellant stated that he had purchased the Studebaker from a used-car dealer on July 18, 1959, and had left the keys on a table in the Melton home [R. T. 93-94].

A handwriting expert testified that the endorsement "A. Welton" on the pink slip found in the appellant's possession had been written by Nuel Melton [R. T. 86].

Mrs. Hacker, a neighbor of Mr. and Mrs. Melton, testified that the appellant had been living with the Meltons in Costa Mesa for several months prior to July 18, 1959 [R. T. 18-19]. Mrs. Hacker stated that she had observed the appellant driving the Studebaker on several occasions prior to July 18, 1959 [R. T. 18-19]. Mrs. Hacker testified that on July 18, 1959, she observed the appellant and Nuel Melton working inside the Studebaker on the left side panel in the rear seat area [R. T. 20]. Shortly after the appellant and Nuel Melton finished working in the car, Nuel Melton and his wife got in the Studebaker and left. This was about two o'clock in the afternoon [R. T. 23].

Mr. Hacker testified that he lived next door to Nuel Melton and his wife; that the appellant had lived with the Meltons from the middle of March to the date of July 18, 1959 [R. T. 26]. Mr. Hacker stated that the first time he saw the gray Studebaker Sedan was at the beginning of April, and that both the appellant and Nuel Melton drove the car [R. T. 27]. Mr. Hacker testified that on July 18, 1959, he observed the appellant and Nuel Melton working on the left side panel in the rear seat area of said Studebaker [R. T. 28]. That about 2:00 p.m. the appellant and Mr. and Mrs. Melton came out of the Melton residence, went to the Studebaker, and Mr. and Mrs. Melton left in the Studebaker [R. T. 35]. Mr. Hacker testified that during the period of time that the appellant resided at the Melton home Mr. and Mrs. Melton would often take trips of short duration; that a pattern developed that when the Melton's would go away on a Saturday, such as July 18, 1959, they would return late at night, and the following Sunday morning two groups of people would arrive, stay inside the Melton residence from ten to thirty minutes and leave [R. T. 31-33].

The appellant and Mr. Nuel Melton became acquainted while they were both incarcerated at Terminal Island [R. T. 153]. The appellant was completing sentence for a prior narcotic smuggling conviction [R. T. 101-103]. The appellant was released from Terminal Island in January of 1959 and thereafter he purportedly lived with a brother in San Leandro, near Oakland, California [R. T. 142, 153, 92].

Miss Ann Lemos, the appellant's girl friend, testified for the defense that the appellant didn't have any

money and spent his time subsequent to January, 1959, looking for a job [R. T. 127].

Frank Castro, the appellant's brother, testified for the defense that the appellant lived with him in San Leandro from January, 1959, until the date of appellant's arrest in August of 1959 [R. T. 130-131]. Frank Castro also testified that although the appellant had worked at Gerber's for a couple days, the appellant's primary source of income was a couple dollars which relatives would give the appellant for cigarette money [R. T. 135, 146]. Frank Castro further testified that the only cars which the appellant ever used were a Mercury owned by Frank Castro and a 1947 Buick which was owned by a friend [R. T. 130-132].

The appellant testified that subsequent to his January, 1959, release from prison his relationship with Nuel Melton was limited to an accidental meeting at a fight arena, a phone call in June, 1959, a weekend visit with the Meltons at their home in Costa Mesa in June, 1959, and the weekend visit of July 18, 1959 [R. T. 154, 158]. The appellant testified that he had come by bus from San Leandro to Costa Mesa to spend the weekend of July 18, 1959 with the Melton's [R. T. 171]. The appellant stated that the only reason for his contact with Nuel Melton was that Mr. Melton was going to give the appellant a job [R. T. 154-158]. The appellant then stated that on the day of his arrest he had $161.00 in his possession. Nuel Melton had given the appellant approximately half of the $161.00 to look for a job and the appellant had saved the remainder. The appellant testified that on July 18, 1959, he watched Nuel Melton fixing the removable compartment in the

gray Studebaker, but that he did not assist [R. T. 157-158]. The appellant testified that when Mr. and Mrs. Melton left their home on the afternoon of July 18, 1959, in said gray Studebaker he thought that the Melton's were going to a doctor in Los Angeles [R. T. 158].

Agent Willard Kingsbury testified that on July 19, 1959, he found a gasoline charge slip for Nuel Melton's Mercury Station Wagon which had the appellant's name on it. The slip shows that Melton's car had been serviced at a station in San Leandro, which was a few blocks from Frank Castro's home [R. T. 162, 177, 205].

Although during the course of the trial the appellant denied knowing that Nuel Melton was smuggling narcotics, the appellant admitted knowledge at the time of sentencing [R. T. 212].

V.

THE QUESTIONS PRESENTED.

The sole question presented by this appeal is whether the evidence was sufficient to sustain the verdict of the Trial Court.

As an additional point on appeal, the appellant alleged that the motion for new trial should have been granted. This allegation is contained in the specifications of error only. Thereafter, the appellant wholly fails to refer or in any manner present this point on appeal. In addition, the motion for new trial was filed in the District Court on June 23, 1961, one and a half years after the filing of a notice of appeal from the judgment of conviction. The appellant did not file a notice

of appeal from the order denying the motion for new trial. Therefore, this Court is without jurisdiction to review the District Court order denying the motion for new trial.

At this time, it should be noted that appellant has failed to comply with Rules 18(2)(b), 18(6), and 18-(2)(g), of the Rules of the United States Court of Appeals for the Ninth Circuit. Although appellee is cognizant of the recourse for such failure to comply, the appellee is also cognizant that this appeal is being prosecuted *in forma pauperis* by a counsel who has generously donated his efforts on behalf of the appellant.

VI.

ARGUMENT.

A. The Appeal Is Moot Since the Appellant Waived the Issue of Sufficiency of the Evidence.

To entitle an appellant to urge in this court that the evidence was insufficient to sustain the verdict, the appellant must, at the close of all the evidence, have interposed in the trial court a motion for judgment of acquittal. By this procedure the question of the sufficiency of the evidence becomes a question of law which the court will consider on appeal. It is well settled that absent such a motion this court will not review the evidence. *Hardwick v. United States,* 296 F. 2d 24 (9th Cir. 1961); *Ege v. United States,* 242 F. 2d 879 (9th Cir. 1957); *McDonough v. United States,* 248 F. 2d 725 (8th Cir. 1957).

There is limited authority for the proposition that if, as in the instant matter, the case was tried to a court without a jury, a plea of not guilty asks the court for

a judgment of acquittal and a motion to the same end is not necessary in order to obtain a review of the sufficiency of the evidence. *Hall v. United States,* 286 F. 2d 676 (5th Cir. 1961); *United States v. Hon,* 306 F. 2d 52 (7th Cir. 1962). The appellee submits that this is an improper construction of the law. A plea of not guilty in any case, be it tried to a court or a jury, is a request for an acquittal.

Therefore, since the appellant did not make a motion for judgment of acquittal at the conclusion of the entire case pursuant to Rule 29 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., he has waived the ground of insufficiency of the evidence and this entire appeal is moot.

B. The Evidence Is Sufficient to Sustain the Conviction.

Assuming for the purposes of this argument that the question of sufficiency of the evidence may be reviewed, the Government respectfully submits that the evidence is sufficient to sustain the conviction. Especially is this true when this Court as it must, considers the evidence and inferences that can be drawn from it most favorably to the Government.

Glasser v. United States, 315 U. S. 60 (1941);

Sandez v. United States, 239 F. 2d 239 (9th Cir. 1956);

Robinson v. United States, 262 F. 2d 645 (9th Cir. 1959);

Young v. United States, 298 F. 2d 108 (9th Cir. 1962);

Benchwick v. United States, 297 F. 2d 330 (9th Cir. 1961);

Debardeleben v. United States, 307 F. 2d 362 (9th Cir. 1962).

The foregoing is equally applicable to a trial by the Court without a jury. *C-O-Two Fire Equipment Co. v. United States,* 197 F. 2d 489 (9th Cir. 1952), cert. den. 344 U. S. 892; *Penosi v. United States,* 206 F. 2d 529 (9th Cir. 1953).

If there is sufficient substantial evidence, even though circumstantial, the verdict must be sustained. *Rossetti v. United States,* .... F. 2d ...., No. 18,255 (9th Cir. March 6, 1963); *Rodella v. United States,* 286 F. 2d 306 (9th Cir. 1960), cert. den. 365 U. S. 889.

Appellee submits that the evidence as indicated in the Statement of Facts clearly demonstrates that the evidence presented was sufficient to sustain the conviction.

VII.

CONCLUSION.

For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Jo Ann I. Dunne